

In the Matter of)
Request for Waiver by Genuity)
Telecom Inc.)
Federal-State Joint Board on) CC Docket No. 96-45
Universal Service)
)

³ See *Federal-State Joint Board on Universal Service*, 17 FCC Rcd 24952, 24972 (2002) (stating that carriers may file a revised Form 499-Q within 45 days of the original filing deadline) (“*Universal Service Order*”); see also FCC Form 499-Q, Instructions for Completing the Quarterly Worksheet for Filing Contributions to Universal Service Support Mechanisms at 9 (notifying carriers that a revised Form 499-Q may be filed within 45 days of the original filing deadline) (“Form 499-Q Instructions”).

Telecom's discovery did not allow it to file a corrected Form 499-Q within the 45-day revision period allowed by the Commission.

Absent a waiver, Telecom's only other opportunity "true-up" the errors on its February 2003 Form 499-Q would be in a 499-A Telecommunications Reporting Worksheet ("Form 499-A") that would not be filed until April 2004. Given Telecom's status as a debtor-in-possession and its impending liquidation, Telecom urgently needs to correct its Form 499-Q filing and have its universal service account adjusted as soon as possible. Time is also of the essence because the Universal Service Administrative Company ("USAC") has filed an administrative claim in Telecom's bankruptcy proceeding to recover the outstanding invoiced amounts based upon the inaccurate revenue reported on Telecom's Form 499-Q. Good cause exists for the expeditious grant of this waiver request under the circumstances presented.

I. BACKGROUND.

A. Calculation Of Universal Service Contributions.

Section 254 of the Communications Act of 1934, as amended (the "Act"),⁴ requires interstate telecommunications service providers to contribute to the USF to ensure that all Americans have access to affordable, quality telecommunications services. USF contributions are a percentage of carriers' interstate and international end user telecommunications revenues.⁵ Such contributions are calculated and collected by USAC based upon revenue data provided by all telecommunications carriers.⁶

⁴ 47 U.S.C. § 254.

⁵ 47 C.F.R. § 54.709(a). This percentage is established quarterly by the Commission.

⁶ USAC was chosen by the Commission to administer the federal universal service support mechanism. The National Exchange Carrier Association ("NECA"), however, acts as USAC's data collection agent for the Form 499 Telecommunications Reporting Worksheets. For

The Commission recently modified its USF contribution procedures to require carriers, beginning with the February 2003 Form 499-Q, to report their projected revenue for the following quarter on the Form 499-Q.⁷ If a carrier subsequently discovers an error on its Form 499-Q, it may revise the form within 45 days of the original filing deadline.⁸ If a carrier does not revise the form within the 45-day period, it may still “true-up” any errors when it files its Form 499-A the following year.⁹ If a carrier files a revised telecommunications reporting worksheet after the filing deadline, however, USAC will return the worksheet as being untimely filed.¹⁰ USAC does not have the authority to waive the filing deadline.¹¹ Accordingly, Telecom must seek a waiver from the Commission in order to promptly correct its 2003 USF invoices.

B. Telecom Has Declared Bankruptcy And Has Discontinued The Provision Of All Telecommunications Services.

Telecom is a wholly-owned subsidiary of Genuity Inc. (“Genuity”). Although Genuity primarily provided unregulated enterprise IP networking services, it also provided private line and other regulated interstate telecommunications services through Telecom. On November 27,

purposes of this waiver request, all references to USAC also include NECA in its role as USAC’s agent.

⁷ See *Universal Service Order*, 17 FCC Rcd at 24972. Historically, carriers would report to USAC on the first day of February, May, August and November of each year the prior quarter’s revenue on a Form 499-Q and the prior calendar year’s revenue on a Form 499-A in April. Because the USF contribution methodology was transitioning from prior quarter end user telecommunications revenue to forward-looking quarterly projections, however, the Form 499-Q due on February 1, 2003, required revenue projections for the first and second quarters of 2003.

⁸ See *id.* at 24972; see also Form 499-Q Instructions at 9.

⁹ See *Universal Service Order*, 17 FCC Rcd at 24972; Form 499-Q Instructions at 9.

¹⁰ See, e.g., *ABC Cellular Corp.*, 17 FCC Rcd 25192, 25196 (WCB 2002) (“*ABC Cellular*”).

¹¹ See generally 47 C.F.R. §§ 54.709(b)-(c), 54.709(d). See, e.g., *ABC Cellular*, 17 FCC Rcd at 25194.

2002, Genuity and its subsidiaries, including Telecom, entered into an agreement with Level 3 Communications, LLC (“Level 3”). Pursuant to the agreement, Level 3 acquired substantially all of Genuity’s assets, including the majority of its U.S. customer base for telecommunications services. Also on November 27, 2002, Genuity and its subsidiaries, including Telecom, filed for bankruptcy protection under Chapter 11 of the U.S. Bankruptcy Code and entered debtor-in-possession status to facilitate the transaction with Level 3.

Upon receiving the necessary approvals from the bankruptcy court and the Commission,¹² On February 4, 2003, Genuity assigned the vast majority of its assets to Level 3, including all but six of Telecom’s telecommunications customers.¹³ Pursuant to Commission rules and procedures, Telecom subsequently sought and obtained Commission consent to discontinue providing service to its six remaining telecommunications customers.¹⁴ It stopped providing all telecommunications services as of April 7, 2003.¹⁵

¹² See FCC Public Notice, *Notice of Streamlined Domestic 214 Application Granted*, 18 FCC Rcd 1127 (2003) (granting Level 3’s acquisition of Telecom’s assets); FCC Public Notice, *International Authorizations Granted*, 18 FCC Rcd 777 (2003) (granting the assignment of Telecom’s international Section 214 authorization to Level 3); FCC Public Notice, *Wireless Telecommunications Bureau Assignment of Authorization and Transfer of Control Applications Action*, Rep. No. 1411 (Feb. 5, 2003) (noting that the Commission granted the assignment of wireless licenses to Level 3 on January 29, 2003).

¹³ See FCC Public Notice, *Wireless Telecommunications Bureau Assignment of Authorization and Transfer of Control Applications Action*, Rep. No. 1455 (Mar. 26, 2003) (listing the consummation of the assignment of wireless licenses to Level 3); Letter from Kent D. Bressie, Counsel, Level 3 Communications, LLC, to Marlene H. Dortch, Secretary, FCC, File No. ITC-ASG-20021216-00592 and ITC-214-19990708-00391 (Mar. 19, 2003) (notifying the Commission that the assignment of Telecom’s international Section 214 authorization was consummated on February 4, 2003).

¹⁴ See FCC Public Notice, *Comments Invited On Genuity Telecom Inc. Application To Discontinue Domestic Telecommunications Services*, 18 FCC Rcd 3393 (2003) (noting that Telecom can terminate service to its remaining customers on April 7, 2003).

¹⁵ Letter from Joan E. Neal, Counsel, Genuity Telecom Inc., to Fabio Nieto, Universal Service Administrative Company (Aug. 20, 2003) (attached certification of Mark Hileman, Senior Vice

C. Telecom's Incorrect Report Of Quarterly Revenues Improperly Raised Its Universal Service Contribution By More Than 3000 Percent.

Telecom timely filed its Form 499-Q on January 31, 2003. The Form 499-Q should have recorded Telecom's projected estimated end user revenue to be derived from interstate and international telecommunications services in the first and second quarters of 2003. The employee preparing the Form 499-Q, however, apparently made two separate clerical errors.¹⁶ First, it appears that she recorded Telecom's projected *annual* revenues for 2003, rather than its projected *quarterly* end user telecommunications revenues. Second, the employee apparently based her projection upon Telecom's prior total gross-billed annual revenues from all sources, not just telecommunications end user revenue (which historically had been a small fraction of Telecom's total revenues). In addition to these clerical errors, the projections did not account for Telecom's planned assignment of the vast majority of its telecommunications customer base to Level 3 in February or Telecom's planned discontinuance of service to its remaining telecommunications customers in the near future (which occurred as of April 7). Accordingly,

President and General Counsel of Genuity Telecom Inc., certifying that Telecom ceased providing telecommunications services on April 7, 2003); Letter from Jennifer L. Kostyu, Counsel, Genuity Telecom, Inc., to Fabio Nieto, Universal Service Administrative Company (October 29, 2003) (providing documentation of the sale of Telecom's assets to Level 3). Telecom has provided USAC with this documentation of the sale of its assets to Level 3 and its discontinuance of service so that USAC can adjust Telecom's USF account to cease invoiced contributions going forward.

¹⁶ As a result of Telecom's declaration of bankruptcy, it retained only minimal staff to wind down the business. The employee previously in charge of completing the Forms 499-Q and 499-A left the company after it declared bankruptcy. As is typical in most Chapter 11 cases, those employees that remained with Telecom have been continuously switching roles and taking on new responsibilities. The first Form 499 report that was due after Telecom's declaration of bankruptcy was the February 2003 Form 499-Q. The employee that took over this task had no prior experience with the Form 499 and was thus unfamiliar with the data collection procedures or the Form 499-Q. Confusion stemming from the Form 499-Q filing process was exacerbated by the fact that the version of the Form 499-Q for the February 2003 filing was intended to transition carriers from reporting prior actual revenues to projected estimated revenues under the new USF contribution procedures.

Telecom's projected quarterly telecommunications end user revenue for the first quarter of 2003 should have been one-thirty-secondth ($1/32$) of the revenue amount actually listed on the Form 499-Q. Moreover, Telecom's projected quarterly telecommunications end user revenue for the second quarter of 2003 should have been close to zero.

As a result of the erroneous revenue reported on Telecom's Form 499-Q, USAC substantially increased the USF amount invoiced to Telecom. Telecom did not immediately notice this increase, however, because it had limited personnel at that time who had taken over additional job responsibilities and who had no prior USF experience and were unfamiliar with the USF collection process. The increase was noticed only when Telecom's monthly bills from USAC accrued to monumental proportions – at least 3000 percent of what should have been billed – at which time Telecom contacted USAC to report the error. After multiple consultations with USAC, it was determined that Telecom's reported revenue on its Form 499-Q was grossly overstated and had resulted in erroneous USF invoices.

I. GRANT OF TELECOM'S WAIVER REQUEST SERVES THE PUBLIC INTEREST.

Telecom currently has large outstanding universal service bills based upon the incorrect revenue data that was listed in its February 2003 Form 499-Q. Furthermore, USAC filed an administrative claim in Telecom's bankruptcy proceeding to recover these outstanding amounts based upon the inaccurate revenue reported on Telecom's Form 499-Q. To compound the issue, Telecom's confirmation hearing to approve the company's liquidation plan is scheduled to begin on November 17. Promptly correcting the USF billing issue will help facilitate Telecom's liquidation process. Therefore, Telecom seeks expeditious waiver of the 45-day deadline for filing a revised Form 499-Q so that its USF contribution amount can be adjusted, allowing USAC to amend its administrative claim accordingly.

A. The Commission Can Waive Its Rules And Procedures For Good Cause.

Pursuant to Section 1.3 of its rules, the Commission may waive one of its rules or procedures when good cause is shown.¹⁷ The U.S. Court of Appeals for the District of Columbia has found that “a waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest.”¹⁸ Furthermore, there must be a rational policy supporting the grant a waiver.¹⁹ In reviewing a waiver request, the Commission also can weigh “considerations of hardship, equity, or more effective implementation of overall policy.”²⁰ Telecom’s waiver request meets this standard and should be granted.

B. Grant Of A Waiver Of The 45-Day Filing Deadline Under The Special Circumstances In This Case Serves The Public Interest.

Telecom’s waiver request meets the judicially prescribed standard and should be granted. Telecom’s miscalculation on its Form 499-Q inadvertently caused its USF contribution bills to increase exponentially. Pursuant to Section 254 of the Act, carrier contributions to the USF must be equitable, specific, predictable, and made on a non-discriminatory basis.²¹ Once USAC processes Telecom’s corrected revenue information, however, Telecom’s outstanding USF bills will be properly recorded. At that time USAC can amend its administrative claim in the bankruptcy court to seek the appropriate amount from the Telecom bankruptcy proceeding. A

¹⁷ 47 C.F.R. § 1.3.

¹⁸ *Northeast Cellular Telephone Co., L.P. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (“*Northeast Cellular*”); see also *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969) (“*WAIT Radio*”).

¹⁹ *Northeast Cellular*, 897 F.2d at 1166; *WAIT Radio*, 418 F.2d at 1159.

²⁰ *WAIT Radio*, 418 F.2d at 1159.

²¹ 47 U.S.C. § 254.

corrected administrative claim also will ensure that Telecom's USF contribution is equitable, non-discriminatory, and consistent with Section 254's mandate.²²

Under the Commission's universal service procedures, Telecom could wait until April 2004 to file its Form 499-A to correct the amount it owes to USAC. Under Telecom's proposed liquidation plan, however, the company may not exist in April 2004.²³ This error can be easily remedied with a waiver, and it is in all parties' best interest to resolve the matter now. If the waiver can be expeditiously granted, USAC may be able to change the amount of its currently disputed administrative claim. Upon approval of Telecom's liquidation plan and the parties' agreement on the proper amount Telecom owes in universal service contributions, Telecom can promptly pay USAC.

The longer the USF invoices remain in question, the more costs the bankruptcy estate will incur to resolve the disputed invoice amounts. Furthermore, unless the invoices are corrected near term, the company's liquidation could be impacted, requiring the estate to expend additional funds that should be paid to creditors. Grant of Telecom's waiver request would allow it to file a revised Form 499-Q and allow USAC to correct Telecom's USF account, thereby benefiting the public interest by avoiding these unnecessary delays and expenditures for all parties. Granting Telecom's waiver also would be in the public interest because USAC will have the opportunity to correct its records, file an amended claim with the bankruptcy court, and to collect the correct USF contribution from Telecom.

²² See *ABC Cellular*, 17 FCC Rcd at 25196 (granting a waiver of the Form 499-A filing deadline to ensure that a carrier does not contribute to the USF more than what is equitable).

²³ Upon the bankruptcy court's approval of Telecom's liquidation plan, a trust entity will be formed to administer and distribute assets to all outstanding claims against Genuity and its subsidiaries, including Telecom.

The magnitude of this revenue reporting and billing mistake also necessitates the quick resolution of this matter. The Commission has previously found the waiver of a filing deadline in the public interest when the affected carrier or company would suffer considerable hardship. For example, in *ABC Cellular*, the Commission directed USAC to accept a carrier's late-filed Form 499-A because to do otherwise would impose a significant hardship on the carrier.²⁴ In the instant case, due to the magnitude of the error and the timing of the bankruptcy process, Telecom would similarly suffer great hardship if it can not promptly file a revised Form 499-Q. As previously discussed, waiting to correct its revenue information could create significant delays and difficulties in the liquidation process to the detriment of the company's creditors and the USF. Grant of Telecom's waiver request would thus be in the public interest and benefit all parties.

II. CONCLUSION.

The special circumstances in this case warrant the prompt grant of a waiver of the 45-day filing period for Telecom's revised Form 499-Q. Specifically, Telecom, a debtor-in-possession, is winding down its business and will soon cease to exist. To require Telecom to wait until April of 2004 to correct its USF bills would impose a significant burden on Telecom, its creditors, the bankruptcy court and USAC. Furthermore, prompt grant of this waiver request will ensure that Telecom equitably contributes to the universal service support mechanism and that USAC collects the correct contribution amount. Telecom therefore requests that the Commission allow it to file a revised Form 499-Q now with the correct end user telecommunications revenue

²⁴ *ABC Cellular*, 17 FCC Rcd at 25196. The Commission also previously ordered the Schools and Libraries Division of USAC to treat as timely filed certain application forms that were submitted after the deadline due to technical difficulties. *Federal-State Joint Board on Universal Service, Universal Service Support for Eligible Schools and Libraries, Year 3 Filing Window*, 15 FCC Rcd 13932 (2000).

information for the first and second quarter of 2003 and direct USAC to accept Telecom's filing and to adjust its outstanding USF invoices accordingly.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Theresa L. Rollins, hereby certify that a copy of the foregoing **REQUEST FOR WAIVER** has been served this 13th day of November 2003 via electronic mail on the following:

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